
NO. A09-1208

State of Minnesota
In Court of Appeals

Maureen Kissack,

Appellant,

vs.

Sheila M. Montognese, Bridget Beaudry, Lori France,
 Sandra Taverna, John Sandahl, and Steven Sandahl,

Respondents.

APPELLANT'S BRIEF AND APPENDIX

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

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LEGAL ISSUES

1. The trial court erred in denying Appellant's request for a judgment notwithstanding the verdict following the trial and for a directed verdict during the trial. App. A-0008.

Ford v. Stevens, 280 Minn. 16, 157 N.W.2d 510 (1968)

Minn. R. Civ. P. 50.01

Minn. R. Civ. P. 50.02

2. The trial court erred in allowing the admission of the decedent's Will and failing to limit testimony on the relationship between the parties including other factors. See Transcript at P. 6, L. 5 through P. 10, L. 10.

Cobboi v. Gibbons, 276 N.W.2d 170 (Minn. 1979)

3. The trial court erred in refusing to provide an instruction to the jury on the difference between probate and non-probate assets. See Transcript at P. 131 L. 10-12.

VanTassel v. Hillerns, 311 Minn. 252, 248 N.W.2d 313 (1976)

4. The trial court erred in denying Appellant's request for a new trial. App. A-0008.

Larson v. Sventek, 211 Minn. 385, 1 N.W.2d 608 (1941)

STATEMENT OF THE CASE

This case originated in the Cass County District Court with The Honorable John P. Smith presiding. The litigation involved the Estate of Patrick W. Butler (the “decedent”) who died on February 1, 2008. App. A-0002 (Finding of Fact 1). Appellant Maureen J. Kissack is the daughter of the decedent. App. A-0002 (Finding of Fact 2). Ms. Kissack was the named Personal Representative and petitioned to probate the decedent’s Last Will & Testament. Decedent’s probate assets consisted of a lake home that sold for approximately \$250,000, miscellaneous personal property, and other assets. *See* Transcript at P. 85, L. 9-25; P. 86, L. 1-18; P. 119, L. 11-21. His non-probate assets consisted of two life insurance policies where the identified beneficiary included some or all of his natural children, but none of his stepchildren, and the accounts at issue that included five Certificates of Deposit (CDs) at the Woodland Bank totaling approximately \$100,000. App. A-0002 (Finding of Fact 5). These accounts were held in joint tenancy with survivorship rights to Appellant. *See* Transcript at P. 99, L. 1-25; P. 100, L. 8-25. *See also* Addendum at Page 2.

Respondents are two of the decedent’s natural children and all of his stepchildren. Respondent Sheila M. Montognese petitioned the trial court to have the CDs included as part of the estate assets. On October 16, 2008, a hearing was

held before Judge Smith on a petition to remove the Personal Representative. Unexpectedly, the judge allowed testimony on not only this issue, but also on the ownership of the CDs. An Order was issued November 4, 2008. App. A-0001 through A-0004. This Order found no grounds to remove Appellant as Personal Representative, but did find that there was clear and convincing evidence that the decedent wanted all of his property divided equally amongst all of his children and stepchildren. App. A-0004. The trial court listed the factors that it considered in deciding that the CDs were an estate asset. App. A-0002 through A-0003. These included the language of the Wills of the decedent and his spouse, the collateralization for at least a portion of the CDs, the lack of evidence that Appellant was entitled to a greater share or that she contributed to the CDs, and the source of the funds. Appellant brought a motion relating to the propriety of the trial court's actions, specifically deciding the issue without proper notice or the assistance of a jury.

The trial court granted Appellant's request. On March 10, 2009, a jury was impaneled to determine whether there was clear and convincing evidence that contrary to the terms of the CDs and the right of survivorship designation elected by the decedent. Ultimately, the jury determined that there was clear and convincing evidence to support that the decedent had a different intent than

electing survivorship designations on each of the five CDs to Appellant thereby making it property of the estate.

Prior to the trial, the trial court denied Appellants' motion in limine to preclude the admission of the decedent's Will and limit testimony on the relationship between the parties including other factors. *See* Transcript at P. 6, L. 5 through P. 10, L. 10. Following the conclusion of Respondents' case in chief, Appellant moved for a directed verdict, which was denied. *See* Transcript at P. 98, L. 2-4. After the jury rendered its verdict, Appellant requested judgment notwithstanding the verdict and/or a new trial. This motion was heard on April 10, 2009, and the trial court issued an Order on May 5, 2009, denying the request. App. A-0005 through A-0008.

Appellant is now appealing the trial court's May 5, 2009, Order, pursuant to Rule 103.03(a) of the Minnesota Rules of Civil Appellant Procedure. The Notice of Appeal was filed July 6, 2009. App. A-0009 through A-0010.

STATEMENT OF FACTS

Patrick W. Butler (the “decedent”) had three natural children. His second wife, Viola Sandahl, had five children. The two prepared their Last Wills & Testaments and signed them on December 6, 1996. *See* Exhibit A and C respectively offered and received as Trial Exhibits 32 and 63. Both Wills had similar provisions. Article IV of Mr. Butler’s Last Will read as follows:

ARTICLE IV

I hereby give, devise and bequeath my property, real, personal and mixed, including but not limited to my interest in real property, IRA’s, insurance policies and checking accounts, wherever so located, to Viola M. Sandahl if she survives me by thirty days.

If Viola M. Sandahl does not survive me by thirty days, or if we die under circumstances which would be deemed a common disaster, I then leave my entire estate in equal shares to the following named persons who are alive at the time of my death: Bridget A. Beaudry, Sheila M. Cooper, Lori M. France, Maureen J. Kissack, Sharon F. Sax, Jack K. Sandahl, Steven K. Sandahl, and Sandra E. Taverna.

See Addendum at Page 1.

Ms. Sandahl died on May 2, 1997, approximately six months after preparation and signing of their Wills. App. A-0002 (Finding of Fact 3). No estate issues arose after Ms. Sandahl’s death.

Sometime in 2000, the decedent opened up an account at the Woodland Bank and purchased five different CDs that totaled approximately \$100,000. *See*

Transcript at P. 93, L. 7-8. In 2003, he renewed these CDs. *See* Transcript at P. 99, L. 4-5 and L. 13-19. *See also* Exhibits F, G, H, I, and J offered as Trial Exhibits 107 and received as Exhibit 108. Each CD had identical terms and required a choice by the decedent. For each CD, the decedent elected a joint account with survivorship rights, and named Appellant as his joint account holder. *See* Addendum at Page 2. The decedent could have chosen other alternative, such as a joint account with no right of survivorship, but did not. *See* Transcript at P. 100, L. 4-25; P. 101, L. 6-12 and L. 21-22.

No one disputed that the decedent chose this election or that the election language was ambiguous. The terms of each CD are clear:

Each of you intend that upon your death the balance in the account (subject to any previous pledge to which we have consented) will belong to the survivor(s).

See Addendum at Page 2. *See also* Transcript at P. 100, L. 8-25.

The bank manager, Craig Johnson, (*see* Transcript at P. 98, L. 20-21) reviewed the entire file and testified that there was no documentation or other information that suggested that the decedent intended anything other than Appellant to be the joint tenant with right of survivorship. *See* Transcript at P. 102, L. 5-8. Mr. Johnson, who also was the decedent's loan officer, testified that the decedent used approximately \$50,000 of the CDs as collateral for a loan. Mr. Johnson explained several options to the decedent. Of the three options he had,

two required an appraisal and a higher interest rate. The decedent chose using the CD as collateral to obtain a lower interest rate and save money on an appraisal. *See* Transcript at P. 103, L. 6-19. Respondents did not refute Mr. Johnson's testimony about why the decedent chose to use the CD as collateral for a loan.

Further, Mr. Johnson also testified that, after the decedent's death, ownership of the CDs automatically transferred to Appellant. *See* Transcript at P. 100, L. 14-25. For that reason, Mr. Johnson testified that Appellant was the sole owner of the CDs and had full rights to all of them, except the ones pledged as collateral. *See* Transcript at P. 101, L. 1-24.

Appellant testified that she did not have knowledge prior to her father's death that she was named joint owner on the CDs with rights of survivorship. *See* Transcript at P. 93, L. 11-13. Appellant sought advice from the estate's counsel, Stephen M. Baker. She was informed that the certificates listed her as the owner upon the decedent's death. Other than the CDs used as collateral, she could immediately seek their release. *See* Transcript at P. 11, L. 21-24; P. 69, L. 15-25; P. 70, L. 1-4. Appellant also contacted her own personal attorney, Ronald Bradley, who gave the same advice. *See* Transcript at P. 114, L. 15-17; P. 115, L. 15-16.

During the trial, all of the witnesses acknowledged that the decedent was of sound and competent mind and had not been unduly influenced. *See* Transcript at P. 10, L. 10-25; P. 41, L. 25; P. 42, L. 1-6; P. 62, L. 10-17; P. 71, L. 5-11; P. 104,

L. 13-19. There was no testimony or documents provided that the decedent had set up the CDs for the convenience of the parties or that he expressed an intent other than what was manifested on the certificates. Stemming from the trial court's decision to allow the introduction of both the decedent's and his deceased wife's Wills, Respondents focused on Article IV of the decedent's Will that provided his estate be divided equally between his children and stepchildren. *See* Transcript at P. 96, L. 25; P. 97, L. 1-2. Counsel for Respondents repeatedly asked the various witnesses if they had any knowledge as to why the decedent would want to exclude them from receiving an equal share of the five CDs in question. *See* Transcript at P. 94, L. 15-16; P. 97, L. 3-14; P. 78, L. 1-6. Respondents' counsel, along with Respondents themselves, interchangeably referenced the two paragraphs contained in Article IV implying the breath of the bequest to his wife that included reference to IRAs, insurance policies, and checking accounts also governed the second paragraph that provided for his children and stepchildren and only included his "entire estate." *See* Transcript at P. 141, L. 24-25; P. 138, L. 17-24. There was no dispute that the Will that had been drafted four years before the joint accounts were set up did not reference the account. All parties agreed that the decedent left the major portion of his assets as probate assets to be governed by the Will. *See* Transcript at P. 120, L. 19-22.

Throughout the trial, all witnesses acknowledged that the decedent had a legal right to name whoever he wanted as joint tenants on any accounts, change beneficiary forms, and decide the terms of the distribution of his estate. *See* Transcript at P. 59, L. 15-18; P. 71, L. 2-4; P. 81, L. 20-23. Although Respondents testified of their belief that the decedent intended to divide the entire estate including his insurance and CDs evenly between all of his children and stepchildren, this assertion was refuted by their own admissions. For example, Respondent Montognese acknowledged that following the decedent's spouse's death, he changed the beneficiary forms on one of the life insurance policies to provide for her and Appellant, and on another one providing for only his natural children. *See* Transcript at P. 46, L. 9-19; P. 47, L. 5-18. Ms. Montognese further acknowledged that she did not offer or intend to offer these proceeds back to the estate to be divided with the others. *See* Transcript at P. 48, L. 8-14. Similarly, none of the beneficiaries who have received proceeds have agreed or offered to turn them over to the estate to be divided with the stepchildren, and none of the Respondents are making such a claim. *See* Transcript at P. 117, L. 7-22; P. 118, L. 9-25; P. 119, L. 1-8.

During trial, there was no oral communications or written documentation presented that during the time leading up to and creating the CDs, that the decedent have an intent of anything other than what was stated on the terms of the CDs.

Without such evidence, Respondents turned to evidence that should have been either inadmissible or irrelevant to the decision. This included the Wills that had been created years earlier and long before the CDs were set up. Respondents made other unsubstantiated inferences in their inquiry relating to the relationship of the parties, the use of CDs as collateral, and the source of the funds.

Prior to trial, Appellant brought a motion in limine for purposes of excluding the admission of the decedent's Will and limiting testimony on the relationship between the parties including other factors; however, the trial court denied this motion. *See* Transcript at P. 6, L. 5 through P. 10, L. 10. After Respondents rested, Appellant moved for a directed verdict, which was denied. *See* Transcript at P. 98, L. 2-4. Further, Appellant requested specific jury instructions that explained the difference between probate and non-probate assets so that the jury would understand that joint tenancy trumps a will. The trial court denied this request. *See* P. 131, L. 9-14.

The trial court erroneously, but consistent with its November 4, 2008, decision, allowed testimony about the relationship between the decedent and the various heirs/devisees. *See* Transcript at P. 44, L. 6-25; P. 45, L. 1-12; P. 58, L. 14-16. Two of the decedent's natural children were estranged from him, one for many years because of a riff over a failure to repay a loan. *See* Transcript at P. 112, L. 21-25; P. 140, L. 23-24. The other was within six months of his death. *See*

Transcript at P. 36, L. 2-6; P. 37, L. 1-9; P. 58, L. 17-19. Only Appellant, the joint owner of his CDs, maintained an ongoing relationship with her father. *See* Transcript at P. 62, L. 4-9; P. 71, L. 14-17. Further, although two of the stepchildren testified that they had a good relationship with the decedent, they never provided any testimony that the decedent intended for anyone besides Appellant to receive the proceeds of the CDs after his death.

Another factor that was listed by the trial court that was irrelevant was the source of the funds used for the CDs. Any inference supported by this inconclusive testimony is improper. *See* Transcript at P. 39, L. 22-25; P. 40, L. 1-4.

ARGUMENT

I. The trial court erred in denying Appellant's request for a judgment not withstanding the verdict (JNOV) following the trial and for a directed verdict during the trial.

The standard of review is essentially the same for the Appellate court as it is for the trial court. The reviewer cannot weigh the evidence or evaluate the credibility of the witnesses. *See Ford v. Stevens*, 280 Minn. 16, 157 N.W.2d 510 (1968). *See also Jansen v. Abaaby*, 261 Minn. 278, 111 N.W.2d 779 (1961). JNOV is proper if there is insufficient evidence or rationale for the jury to find for that party on that issue. *See* Minn. R. Civ. P. 50.02. A similar standard applies to a directed verdict motion. *See* Minn. R. Civ. P. 50.01.

It is undisputed that Respondents had the burden of proof to establish by clear and convincing evidence that the decedent had a different intent than what was specified on the CDs. Other than the Will, there is no documentation or affirmative statements that the decedent had expressed an intent of anything other than Appellant becoming the owner of the CDs upon his death. All of the evidence provided by Respondents failed to provide a justifiable inference of the decedent's intent that is referenced in the trial court's denial of JNOV. None of the evidence ever came close to approaching the clear and convincing standard that is required by the statute.

The trial court erroneously listed a number of factors it considered as support for its decision, but neither individually nor in combination do these constitute clear and convincing evidence that the decedent had an intent other than that Appellant receive the CDs upon the decedent's death.

The first factor the trial court identified, and Respondents argued, were the Wills of the decedent and his spouse. Since the CDs were created long after the Wills were prepared and signed, whatever intent the decedent had at the time that he signed was irrelevant. In addition, the decedent's Will did not contain a specific reference to the assets at issue as required by the statute. These Wills are not a basis to support the jury verdict.

Testimony provided by Respondents was consistent – the decedent’s Will was not intended to govern the non-probate assets. For example, Respondent Montognese acknowledged during cross-examination that she was named beneficiary on two life insurance policies. On one of the policies, the only beneficiaries were her and Appellant, and on the other were all the decedent’s natural children. These change in beneficiary forms occurred following the decedent’s spouse’s death and obviously excluded his stepchildren.

To avoid confusion and ambiguity that can be created by language in a will versus rights of survivorship in joint accounts, Minnesota adopted and passed a statute addressing this issue. Minn. Stat. § 524.6-204 provides that:

Sums remaining on deposit at the death of a party to a joint account belong to the surviving party or parties as against the estate of the decedent *unless there is clear and convincing evidence of a different intention, or there is a different disposition made by a valid will as herein provided, specifically referring to such account.*

Minn. Stat. § 524.6-204(a), emphasis added.

Article IV of the decedent’s Will referenced a bequest to his children and stepchildren as follows:

If Viola M. Sandahl does not survive me by thirty days, or if we die under circumstances which would be deemed a common disaster, I then leave my entire estate in equal shares to the following named persons who are alive at the time of my death: Bridget A. Beaudry, Sheila M. Cooper, Lori M. France, Maureen J. Kissack, Sharon F. Sax, Jack K. Sandahl, Steven K. Sandahl, and Sandra E. Taverna.

The paragraph prior to this one was with reference to the decedent's spouse and read as follows:

I hereby give, devise and bequeath my property, real, personal and mixed, including but not limited to my interest in real property, IRA's, insurance policies and checking accounts, wherever so located, to Viola M. Sandahl if she survives me by thirty days.

Throughout the trial, Respondents interchanged these two paragraphs claiming that the broad provisions relating to the bequest to the decedent's wife also applied to his children and stepchildren. If the decedent would have wanted the beneficiary of his life insurance policy to be the estate, he would not have changed them. Similarly, if the decedent wanted the CDs to be governed by his Will, he had two options – name the estate as beneficiary or change the terms of his Will and identify the CDs held at the Woodland Bank to be distributed as part of his estate. He did neither. Respondents failed to present any evidence that these proceeds should become part of the estate and distributed equally to his children and stepchildren.

Another factor that the trial court used to justify the decision was the inference drawn that Appellant had not proved that her receipt of a greater portion of the estate was justified. The language that the trial court included in its May 6, 2009, Order was as follows:

The jury could have inferred from the testimony that there was no special relationship between Ms. Kissack and the decedent that would have justified a substantially greater portion of the estate going to her

rather than the other children or stepchildren. Testimony regarding the decedent's relationship with his stepchildren could have led the jury to infer that he would not wish to deprive them of the assets in contention.

App. A-0007. Requiring Appellant to prove special circumstances in effect shifts the burden of proof from Respondents to her.

No doubt, some limited testimony on the general background of the relationship between the decedent and the devisees/heirs was helpful, but it is irrelevant and cannot be a basis for the verdict. There is no support under statute or case law that requires a party to have a special relationship with a decedent in order to receive a bequest, be a beneficiary, or have survivorship rights to a joint account. Even though the trial court claimed that such an inference could be drawn, this does not support the jury determination where the burden required is clear and convincing proof. For example, although Respondent Beaudry, one of the decedent's daughters, was present, she did not testify or dispute that she and her father had been estranged for years. Respondent Montognese provided testimony confirming that Appellant and the decedent shared a close relationship. Several of the decedent's stepchildren testified that they enjoyed a good relationship with the decedent, but there was no evidence that he intended that the CDs he held jointly with Appellant to become part of his estate upon his death.

Whether or not the relationship with Appellant merited a greater portion of the estate is irrelevant and not proper support for the jury's decision. As conceded

throughout the trial, the decedent had a right to dispose of his assets as he felt appropriate. There was no claim of undue influence or that he was not of sound mind. Due to the complete failure by Respondents to provide any proof that there was a different intent of the decedent as required by Minn. Stat. § 524.6-204(a), the language of the CDs themselves govern.

One more factor the trial court stated justified the verdict was the collateralization of approximately \$50,000 of the joint tenancy accounts. The judge stated that the jury could have interpreted this conduct as support for their findings. However, the bank officer's testimony, which was not contested, set forth that the only reason the decedent chose this was because of the cost associated with the appraisal of using the other collateral and the reduced interest rate if he used the CD. This testimony does not support the verdict rendered by the jury.

Respondents' proof did not even meet the simple preponderance of evidence burden let alone a clear and convincing requirement. The trial court should have granted Appellant's motion for JNOV or directed verdict.

II. The trial court erred in allowing the admission of the decedent's Will and failing to limit testimony on the relationship between the parties including other factors.

The standard of review is an abuse of discretion. Courts generally will not reverse a decision unless practical justice requires otherwise. *See Cobboi v.*

Gibbons, 276 N.W.2d 170 (Minn. 1979). In the current case, allowing the decedent's Will into evidence shifted the burden of proof to Appellant. In its November 4, 2008, Order, the trial court included these irrelevant factors as support of its decision that the CDs were an estate asset. The trial court acted similarly in its decision to allow the admission of the Will and nonrestrictive arguments relating to the relationship of the parties, which resulted in a jury verdict inconsistent with Minnesota law.

The introduction of the decedent's Will was more prejudicial than probative causing confusion and ambiguity and had nothing to do with the decedent's intent at the time the CDs were established. The decedent's intent in 1996 is only relevant to the probate assets. What is critical is his intention when he set up the CDs years later and renewed them in 2003 and made no changes thereafter.

Likewise, the inference drawn by Respondents of the use of several of the CDs as collateral for a loan does not provide clear and convincing evidence nor a basis to support the jury verdict. Craig Johnson, the bank manager, testified that the decedent decided to use the jointly-held CDs as collateral to avoid a costly appraisal of the decedent's trailer and to secure a lower interest rate. The decedent did not discuss with Mr. Johnson an intent to change the disposition of the jointly-held CDs or otherwise convert them into estate assets.

The trial court also referenced that one of the factors that supported the verdict was Appellant's lack of contribution to the CDs. Distribution of assets on a transfer of ownership in joint accounts is not dependant upon contributions, and this consideration is irrelevant and not a basis to support the jury verdict.

III. The trial court erred in refusing to provide an instruction to the jury on the difference between probate and non-probate assets.

The standard of review requires that the trial court's instructions must prejudice Appellant to constitute a reversible error. *See VanTassel v. Hillerns*, 311 Minn. 252, 248 N.W.2d 313 (1976). The trial court's failure to provide an instruction that differentiated between probate and non-probate assets was unduly prejudicial and precluded a fair trial. Without guidance that non-probate assets trump a will, the jury had no basis to come to the right conclusion based upon the evidence.

The appellate court has determined that there are grounds for reversal when the jury instructions fail to provide the governing law. For example, in *Schnore v. Baldwin*, 217 Minn. 394, 14 N.W.2d 447 (1944), the court failed to give instructions concerning the obligation of a driver on a private roadway to yield the right-of-way to the vehicles on the highway. The trial court in precluding the instructions of the law governing private property prevented the jury from guidance on a critical issue. Similarly, in the present case, the jury should have been informed about the difference between probate and non-probate assets and

that joint tenancy with survivorship designation is not a probate asset and cannot be devised by a will. Without these instructions, the jury was left without any guidance on the issue at hand, which clearly unduly prejudiced Appellant and in fact lead to a verdict in contradiction to Minnesota law.

IV. The trial court erred in denying Appellant's request for a new trial.

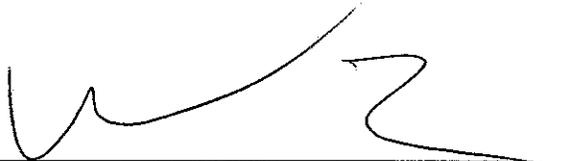
The request for a new trial standard of review requires a clear abuse of discretion. *See Larson v. Sventek*, 211 Minn. 385, 1 N.W.2d 608 (1941). Appellant's request for a new trial is based upon numerous errors that both individually and in combination prejudiced Appellant. These have already been discussed herein and include the introduction of the decedent's Will, his spouse's Will, the relationship between the parties, the source of the funds used to purchase the CD accounts, the decedent's use of the CDs as collateral for a loan, and the relationship between the parties. These evidentiary decisions, along with the trial court's refusal to include an instruction to the jury that joint tenancy with the right of survivorship trumps a will, were a clear abuse of discretion and mandates a new trial.

CONCLUSION

Appellant requests that the matter be remanded to the trial court to review her motion for JNOV requiring a review of its evidentiary decisions. If the JNOV request is not granted, Appellant requests a new trial with the preclusion of the

decedent's Will, the decedent's spouse's Will, the source of the funds, the use of CDs as collateral for a loan, and the relationship between the parties, as well as providing instruction to the jury that there is a difference between probate and non-probate assets, specifically that joint tenancy with survivorship rights trumps a will.

Dated: 9/9/09

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